

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

**JUDY A. ARBOGAST,**  
**Plaintiff,**

**vs.**

**CASE NO. 3:07CV28  
(Judge Maxwell)**

**MICHAEL ASTRUE,**  
**Commissioner of Social Security,**  
**Defendant.**

**REPORT AND RECOMMENDATION/OPINION**

On March 8, 2007, Plaintiff, Judy A. Arbogast, (“Plaintiff”), through her counsel Brock M. Malcolm,<sup>1</sup> filed a Complaint in this Court pursuant to 42 U.S.C. § 405(g), to review a denial of Supplemental Security Income (“SSI”) and Disability Insurance Benefits (“DIB”), under the Social Security Act [Docket Entry 1]. On May 21, 2007, Defendant Michael Astrue, Commissioner of Social Security [“Defendant”], through his counsel, Helen C. Altmeyer, filed his Answer to the Complaint [Docket Entry 7]. On June 20, 2007, Plaintiff filed her Motion for Summary Judgment [Docket Entry 10]. On July 16, 2007, Defendant filed his Motion for Summary Judgment [Docket Entry 12]. This matter has been referred to the undersigned United States Magistrate Judge for a Report and Recommendation to the District Judge. 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b).

Plaintiff filed her current Applications on August 29, 2002, alleging inability to work as of January 9, 2001, due to post-traumatic stress disorder, anxiety, depression, fatigue, arthritis in her back and neck, mitral valve prolapse, carpal tunnel surgery, and a shoulder surgery (R. 81-84). Her claim was denied at the Initial and Reconsideration levels on January 3, 2003, and March 7, 2003, respectively (R. 64, 71). She requested a hearing, which was held on August 11, 2004, before Administrative Law Judge Steven Slahta (R. 462). On November 22, 2004, the ALJ issued his

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<sup>1</sup>By Order dated November 13, 2007, attorney Travis M. Miller was substituted for Brock M. Malcolm.

Decision denying benefits, finding “The claimant was not under a ‘disability,’ as defined in the Social Security Act, at any time though the date of this decision . . . .” (R. 30).

The Court notes that Plaintiff had filed a previous application on November 1, 2001, alleging, as in the present case, disability since January 9, 2001 (see N.D.W.V. 2:04cv43 (2007)). On September 12, 2007, the Honorable Robert E. Maxwell, District Judge for the Northern District of West Virginia, found Plaintiff’s condition met the requirements of 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.05(C), and remanded solely for a calculation of benefits. In other words, this Court has already found Plaintiff disabled as of January 9, 2001, the same date she alleges she became disabled in the case presently before the Court. It therefore appears to the undersigned United States Magistrate Judge that the issues in the present case have already been addressed and resolved by the prior decision of the Court.

#### **RECOMMENDATION**

For all the above reasons, and for the same reasons stated in the District Court’s Order in Judy A. Arbogast v. Commissioner, 2:04CV43 (N.D.W.V. 2007), the undersigned United States Magistrate Judge respectfully **RECOMMENDS** Defendant’s Motion for Summary Judgment be **DENIED**; Plaintiff’s Motion for Summary Judgment be **GRANTED**; this action be remanded to the Commissioner solely for the calculation of benefits; and this action be dismissed and stricken from the Court’s docket.

Any party may, within ten (10) days after being served with a copy of this Report and Recommendation, file with the Clerk of the Court written objections identifying the portions of the Report and Recommendation to which objection is made, and the basis for such objection. A copy of such objections should also be submitted to the Honorable Robert E. Maxwell, United States District Judge. Failure to timely file objections to the Report and Recommendation set forth above

will result in waiver of the right to appeal from a judgment of this Court based upon such Report and Recommendation. 28 U.S.C. § 636(b)(1); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984), cert. denied, 467 U.S. 1208 (1984); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); Thomas v. Arn, 474 U.S. 140 (1985).

The Clerk of the Court is directed to mail a copy of this Report and Recommendation to counsel of record.

Respectfully submitted this 15th day of November, 2007.

/s John S. Kaull

JOHN S. KAULL

UNITED STATES MAGISTRATE JUDGE